

Construction contractors that make improvements to real estate by taking materials off the market and permanently affixing them to real estate owe Use Tax on the cost price of those materials. See 86 Ill. Adm. Code 130.2075. (This is a GIL).

July 13, 1999

Dear Ms. Xxxxx

This letter is in response to your letter received June 15, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

This letter is to verify the Sales and Use Tax laws for your state and that we are complying. Our company makes retro fit bathroom fixtures, which we sell FOB CITY/STATE to hotels and motels in your state. These fixtures are attached to real property as a capital improvement and are installed by our install teams. Our contracts and invoices separate material, labor and freight charges, therefore we deduct labor from the gross sales and pay the tax on the balance. We do not have a physical location in Illinois, and our install teams are sent from STATE for the installation services.

In registering with your state, we were told that we needed to register with the Secretary of State as a foreign corporation and would be required to file a corporate tax return.

We request you review the information we have provided you and share with us your findings. It is our goal to be 100% compliant, however we need your feedback in writing to verify our actions. We request you reply via certified mail so that this information can be retained as a matter of record.

It is important we receive a reply. If we do not hear from you we accept that as your answer that we are meeting your requirements.

Contractors that make improvements to real estate by taking materials off the market and permanently affixing them to real estate in Illinois owe Use Tax on the cost price of those materials. See the enclosed copies of 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. Those construction contractors do not incur Retailers' Occupation Tax liability when they permanently affix tangible personal property to real estate. It is immaterial that a sub-contractor actually affixes the materials to the real estate.

It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of higher prices or by including provisions in their contracts that require customers to "reimburse" the construction contractor for his or her tax liability. Please note that this reimbursement cannot be billed to a customer as "sales tax," but can be listed on a bill as a reimbursement of tax. The choice of whether a construction contractor requires a tax reimbursement from the customer or merely raises his or her price is a business decision on the construction contractor's part.

If the construction contractors purchase tangible personal property in Illinois for permanent affixation to real estate, they must pay Use Tax to the Illinois retailer (supplier) at the time of purchase. If the purchases occur outside the State with no Illinois Use Tax being paid, those construction contractors must register with the Department for the limited purpose of self-assessing Use Tax.

Persons from other states who act as construction contractors in Illinois by permanently affixing tangible personal property to real estate owe Illinois Use Tax on the cost price of those materials. The Illinois Use Tax Act contains a credit provision for taxes which were properly due and paid to another state with respect to the purchase or use of tangible personal property in Illinois. See the enclosed copy of 86 Ill. Adm. Code 150.310(a)(3).

If an out-of-State contractor also makes retail ("over-the-counter") sales to Illinois customers, that contractor may be required to register and collect Use Tax on those sales. The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. Subcontractors in Illinois are generally considered representatives of general contractors for purposes of determining physical presence for tax purposes.

The Department determines whether the two-prong test in *Quill* has been satisfied on a case-by-case basis. Generally, we believe that an out-of-State general contractor utilizing subcontractors in Illinois on at least two or three projects a year would be sufficient to establish a physical presence for nexus

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purposes and require that general contractor to collect Use Tax on its "over-the-counter" sales in Illinois.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Martha P. Mote  
Associate Counsel

MPM:msk  
Enc.